

life, i.e., not immediately visible, as suggested by Pavelle et al., in order to allow the device and method to also function as a shelf-life or useful life indicator” (see, Action at page 3). Applicant traverses the rejection and respectfully requests reconsideration thereof.

One skilled in the art would NOT have been motivated to modify Perlman in the manner asserted by the Office to arrive at Applicant’s claimed invention. The Office acknowledges that “Perlman et al., does not disclose that the latent marking does not become visible immediately following exposure of the medical device to air...” (see, Final Rejection at page 2). In fact, Perlman reports:

...the deposited dye, which can be positioned to show the integrity of the package through a transparent cap, will *immediately* transform to the colored state if there is any oxygen admitted...

(see, Perlman at col. 1, lines 59-63 (emphasis added)). Thus, Perlman not only fails to teach that the latent marking does not become visible immediately following exposure of the medical device to air, as the Office correctly points out, but it goes one step further and clearly states that the latent marking *immediately* becomes visible upon exposure to air. Indeed, the kinetics of the chemical reactions reported in Perlman suggest the same. Applicants are unable to locate any portion of Perlman that teaches or suggests any element of time delay. Contrary to the assertion by the Office, one skilled in the art would NOT have been motivated to modify Perlman with Pavelle because doing so would destroy the intent, purpose and function of the invention disclosed in Perlman. A section 103 rejection based upon a modification of a reference that destroys the intent, purpose, or function of the invention disclosed in the reference is not proper and a *prima facie* case of obviousness cannot therefore be made. *See, In re Gordon*, 733 F.2d 900, 221 U.S.P.Q. 1125 (Fed. Cir. 1984) (to render the prior art inoperable for its intended purpose is the antithesis of obviousness). Perlman reports a package that is sealed to maintain an anaerobic environment within the package. One intent of the Perlman invention is to detect and immediately demonstrate whether the food product, pharmaceutical, or chemical material, that is maintained within the sealed package, has been tampered (see, Perlman at col. 1, lines 5-11). Introducing an element of time delay to the Perlman invention, as the Office suggests, would defeat a purpose of the Perlman invention. The element of time delay would not be desirable in packaging designed to detect tampering. It is essential that tamper resistant packaging indicate a

breach immediately, not after a period of time that would allow a consumer to ingest the food product, pharmaceutical, or chemical material which may have been tampered. In short, Pavelle provides no technological motivation for engaging in the modification of Perlman. Thus, one skilled in the art would not have been motivated to combine Pavelle with Perlman, as the combination of references is improper for its use of hindsight reconstruction based upon Applicant's disclosure. *In re Fine*, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988) ("One cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to deprecate the claimed invention.").

Moreover, the combination of Perlman and Pavelle does not result in Applicant's claimed invention. As elaborated upon in Applicant's response filed December 31, 2007, the contents of which are incorporated herein by reference in their entirety, claim 13 recites a "medical device sealed in gas tight packaging...". The Office asserts that it would have been obvious to one of ordinary skill in the art to modify Perlman by including the semi-permeable membrane of Pavelle. Indeed, Pavelle reports an Air Sensitive Reagent (ASR) that is semi-porously sealed such that air contacts the reagent over time and the reagent changes color (see, Pavelle at col. 2, lines 46-50). Even if one skilled in the art would have been motivated to combine Perlman with Pavelle (with which Applicant respectfully disagrees) such combination does not result in the claimed invention; indeed, such combination produces the antithesis of the claimed invention. Whereas, claim 13 recites a "medical device sealed in gas tight packaging...", the combination of Perlman with Pavelle would not result in a medical device that is "sealed in gas tight packaging."

In view of the foregoing, it is clear that the Office has not established a *prima facie* case of obviousness, because there is no motivation to combine Perlman and Pavelle and, even if combined, Applicant's claimed invention is not produced. Accordingly, Applicant respectfully requests that the rejection under 35 U.S.C. §103(a) be withdrawn.

The Action further alleges that claims 14 and 18 are unpatentable over Perlman and Pavelle as applied to claims 13, 15-17, and 19-24, further in view of U.S. Patent No. 4,502,605 (hereinafter, "Wloszczyna") and U.S. Patent No. 5,997,964 (hereinafter, "Klima"). Perlman and Pavelle do not render claims 14 and 18 obvious for at least the same reasons as discussed